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October Term, 1969

No. 655

JOSEPH THOMAS MULLOY,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. Whether the decision of the United States Court of Appeals for the Sixth Circuit, that in the circumstances of this case the petitioner's selective service local board neither abused its discretion refusing to reopen the petitioner's classification, nor reopened such classification in fact, is in conflict with the decisions of other Courts of Appeal on the same question?

2. Whether the present petition for certiorari raises the same issue raised in *United States v. Sisson*, and *Welsh v. United States*, which are currently before this Court?

3. Whether certiorari should be granted to prevent a gross miscarriage of justice and the violation of the Congressional policy of affording meticulous procedural protections to registrants, like the presnet petitioner, who claim to be conscientious objectors.

ARGUMENT

1. An important consideration governing the granting of review on certiorari is whether a Court of Appeals has rendered a decision that is in conflict with the decision of another Court of Appeals on the same matter. The petitioner has contended that the decision of United States Court of Appeals for the Sixth Circuit in the case at bar on the question of when a board abuses its discretion in refusing to reopen and when it has reopened in fact, is in conflict with the decisions of all other Courts of Appeal that have passed on the question. He further contends that, again in conflict with the decisions of other Courts of Appeal on the same question, the Sixth Circuit has applied the "basis in fact" test applicable to judical review of a board's final determination to the review of the board's determination that a registrant failed to make out a *prima facie* case for reopening, and in so doing, allows a board to engage in evaluative consideration of all the information in a registrant's file under the guise of determining whether the new information submitted by the registrant, if true, would entitle him to the claimed classification.

The United States does not meet the substance of the petitioner's contention with respect to the conflict among the Courts of Appeal. It ignores the basis of the decision of the Sixth Circuit in the case at bar. It likewise ignores the interpretation that Court put on a board's power under 32 C.F.R. Section 1625.2, 1625.4, and on the scope of review of

the board's action by the Court. Instead, it tries to justify the action of the local board on a totally different ground, and says that, therefore, the Court of Appeals was correct in holding that, in the circumstances of this case, the board did not abuse its discretion in refusing to reopen. In so doing, it introduces a *third test* for interpreting the board's power under 32 C.F.R. Section 1625.2 1625.4 If the administration of the draft law is to have some minimum of uniformity, this Court should grant certiorari to determine once and for all when a board is required to reopen a registrant's classification under 32 C.F.R. Section 1625.2, when it may refuse to reopen under 32 C.F.R. Section 1625.4, when it has in fact reopened by engaging in evaluative consideration, and what is the role of the Courts in reviewing a board's decision to refuse to reopen.

The Court of Appeals explicitly stated why the board did not abuse its discretion in denying the petitioner's request to reopen:

> "In our judgment, he did not make out a *prima facie* case of conscientious objection, and the additional information that he supplied did not justify a change in his classification." 414 F.2d at 426.

It accepted the statement of the Chairman that "Mulloy's claim for deferment was based principally upon his job," and observed that "Mulloy's letter dated November 17, 1967, from which we have quoted, indicated rather clearly that his objection to serving in the Armed Forces was based on essentially political, sociological or philosophical views rather than on religious training and belief." 412 F.2d at 425. It explicitly held that the board could consider all the evidence in his file and his statements at the interview in determing whether or not he had made out a *prima facie* case. According to the Court this consideration justified the conclusion that he was seeking an occupational deferment, and/or that his objection to military service was not based upon religious training and belief.

It is the submission of the petitioner that this is the clearest example of evaluative consideration under the guise of determining whether the registrant has made out a *prima facie* case. Both in result and rationale it is directly in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Miller v. United States*, 388 F.2d 973 (9th Cir., 1967), and the decision of the Court of Appeals for the Fifth Circuit in *Robertson v. United States*, 404 F.2d 1141 (5th Cir., 1968). The United States does not dispute the general proposition that a board may not under the guise of refusing to reopen evaluatively weigh the new information. (Brief of the United States, pp. 17-18). It grudgingly assumes, *arguendo*, that the petitioner's responses to the questions contained in SSS Form 150 and the accompanying letters did present a *prima facie* case for classification as a conscientious objector. (Brief of the United States, p. 18), and admits the correctness of cases such as *United States v. Freeman*, 388 F.2d 246 (7th Cir., 1967), *Davis v. United States*, 410 F.2d 89 (8th Cir., 1969), and *Howze v. United States*, 409 F.2d 27 (9th Cir., 1969), holding that when such information does prevent a *prima facie* case, the board must reopen. And it does not even comment on the petitioner's argument that the Sixth Circuit's standard of review of a board's refusal to reopen a classification is the same test that is applied to review of a board's final determination, which is directly in conflict with the decisions of other courts of Appeal on this question. (Petition for Certiorari, pp 17-20).

It then goes on, however, to introduce a new test to determine whether the board must reopen the classification under 32 C.F.R. Section 1625.2. Even though a *prima facie* case is presented on the basis of the SSS Form 150 and the supporting letters, the board can still refuse to reopen, according to the United States, "where, as in this case, the board has grounds for questioning the truth or sincerity of the allegations relied on." (Brief of the United States, p. 19). In such a case the board "can scrutinize the representations and inquire further - as part of the process of determing whether, in

the exercise of its discretionary authority, reopening would be appropriate." *(Ibid.)* It then concludes:

> "In determining whether a *prima facie* basis for reopening had been made, the board could, in other words, properly discount petitioner's previous written representations by his substantially contemporaneous statements made at the interview and in the subsequent November 12 letter. At least to the extent that the board's refusal to reopen was based on the foregoing considerations - and the record, it is submitted, fairly reflects that they were important if not indeed the decisive bases of the board's action - the board did not engage in an evaluative weighing of an otherwise sufficient *prima facie* showing within the meaning of the decisions relied on by petitioner. What the board essentially did was to determine that the representations of the Form 150 and its accompaniments, viewed in the light of the contemporaneous statements, did not amount to such a *prima facie* showing as would justify reopening." (Brief of the United States, 21).

The above, it is submitted, is circular and internally inconsistent. The United States is apparently trying to say that there are two kinds of *prima facie* showings a registrant can make - that which is sufficient to require a reopening and that which is not - but it never says how they differ. Then it says that the board can "properly evaluate" the statements in the 150 Form and the supporting letters against "substantially contemperaneous statements of petitioner himself, and conclude that no *prima facie* case has been presented." (Brief of the United States, pp. 20-21). But, says the United States, this does not constitute an evaluative weighing. If it is not an evaluative weighing, then, it may be asked, what is it? The United States suggests in its discussion of *Miller v. United States, supra,* (Brief of the United States, p. 21, n. 6), that there the board weighed *inconsistent actions,* namely the registrant's claim of conscientious objector status against the

fact that he had sought to enlist in a reserve program. This, it admits, constitutes impermissible evaluative weighing and a reopening in fact. But in the case at bar the United States contends that the weighing was only of *inconsistent statements.* The board, it says, weighed the petitioner's statements in his SSS Form 150 and the statements in the supporting letters against his statement during the brief interview and concluded that he did not make out a *prima facie* case for classification as a conscientious objection. The fact that the same mental processes are involved in these two kinds of evaluation and the fact that the board is deciding in both cases that the registrant is not really a conscientious objector make no difference, according to the government, because while it is impermissible to weigh *inconsistent actions,* it is perfectly permissible to weigh *inconsistent statements.* Of course, the Court in *Miller* and in the other cases relied on by the petitioner drew no such distinction, and it is patently absurd. Evaluative consideration is a weighing of *facts,* whether reflected in action or reflected in statements, and this kind of evaluative consideration was engaged in here just as it was in *Miller* and the other cases. In all of these cases the board found that the claim was not "genuine." The only difference is that the Sixth Circuit upheld this type of evaluative consideration and the other Courts found it to be improper.

Nor does the United States ever indicate *what else the board would have done or what else it could have considered if it had in fact reopened the classification.* The approach of the United States, as well as the approach of the Sixth Circuit, would completely obliterate any distinction between a refusal to reopen on the ground that the registrant has failed to present a *prima facie* case and a denial of the claimed classification on the merits following a reopening. If the board has grounds for questioning the truth or sincerity of the allegations made by the registrant, *this is the clearest case requiring a reopening.* Only by such a reopening can the

factual questions - be resolved. The United States is saying just the opposite. It is saying that the refusal to reopen despite a case of *prima facie* sufficiency was justified precisely because the board could have found, in view of the other statements that the petitioner made, that he was not sincere, that he was lying when he completed the SSS Form 150, and that the persons writing the supporting letters were lying or mistaken. Certainly the board is entitled to make such a finding, but it cannot do so under the guise of finding that the petitioner did not make out a *prima facie* case. This is a decision on the merits, entitling him to an administrative appeal, and as even the United States admits, the board does not have the discretion to decide the merits under the guise of refusing to reopen.

More significantly, the premise on which the United States is proceeding, that the board was justified in refusing to reopen because it had grounds for questioning the petitioner's truth or sincerity, is totally unsound. *This is simply not what happened.* Nowhere in its Brief does the United States suggest precisely what the petitioner said that would have given the board causes to disbelieve his sincerity. It refers to the fact that he wanted to continue his work with the poor in Appalachia, and that if denied the classification, he would either submit to induction and teach his fellow soldiers "the truth about Vietnam and the principles of non-violence" or would resist induction There is nothing in either of these facts that is inconsistent with the claim of conscientious objection. Quite to the contrary they further attest to the petitioner's sincerity and the tenaciousness of his beliefs. In his answers to the SSS Form 150 the petitioner described at length his work among the poor, and related this work to his religious beliefs, which formed the basis of his conscientious objection to participation in war. (Pet. App. 28a). It was these beliefs which caused him to forego participation in the "affluent society" and work among the poor, and no rational person could say that because he

wanted to work among the poor, he could not at the same time be conscientiously opposed to participation in war. The fact that he would yield to superior force and suffer induction if his claim was denied could not mean that he held his beliefs any less strongly. In fact he did not yield and now face a sentence of five years' imprisonment and a fine of $10,000.

In any event, this argument ignores the simple fact *that there is nothing in the record to show that any board member ever raised a question concerning his sincerity.* The United States tries to argue that when the board members said they "assumed he was sincere," they did not mean that he was sincere about his representations that he was a conscientious objector. Moreover, says the United States, only two members testified on this point, and the others may have felt differently (since the government at the trial did not question the petitioner's sincerity either, the failure to obtain this admission form the other board members should be understandable). It would seem that since the argument of the United States is premised on the fact that the board members believed him to be insincere, it should come up with at least a shred of evidence to that effect. It cannot do so, because the government's position heretofore has been that, assuming the petitioner to be sincere, the board was justified in refusing to reopen on the ground that the petitioner had failed to make out a *prima facie* case. The following dialogue between the government's attorney, Mr Huddleston and board member Wolking, demonstrates this most clearly:

> Q. As I understand it then, you did not inquire into his sincerity, but the prima facie case that he presented?
> A. That is quite true.
> Q. Assuming that he was sincere?
> A. We assumed he was sincere, that's right. (Pet. App. 49a).

Board member Wolking, following the lead of the government's attorney and presumably speaking for the board collectively, said that the board never inquired into the petitioner's sincerity. Now the United States is saying that the board was justified in refusing to reopen, because it had grounds for questioning the truth or sincerity of the petitioner's allegations. The board did not think it had those grounds, or at least, if it did, no one ever said so, and this had nothing to do with its decision. As Mr. Woking again stated this time, on cross-examination:

> Q....in other words, you did not question his sincerity, I take it?
> A. That is correct.
> Q. You believed his sincerity - you believed that everything he said, even if true, would not entitle him to be a conscientious objector?
>
> A. Everything that was in the record and what he said. (Pet. App 51a).

The United States has not referred to a single place in the record where any board member suggested that the board believed the petitioner not to be sincere in his beliefs and in all his representations to the board written and oral.

Finally, says the United States, the board must have assumed the petitioner to be insincere, because, "if they assumed petitioner was sincere in his claim to be a conscientious objector, it would have been entirely inconsistent, and indeed

inexplicable, for them to vote not to reopen." (Brief of the United States, p 222). *This is the point the petitioner has been trying to make all along.* Since the board members assumed that he was sincere, and since as even the United States is willing to admit *arguendo*, he made out a *prima facie* case on the base of his SSS From 150 and the supporting letters, the board should have reopened. They refused to do so only because they denied his claim on the merits, and therefore he was entitled to an administrative appeal. Perhaps the reason they refused to reopen was, as the petitioner contends, that "they had little or no understanding of the applicable law" and "clearly demonstrated administrative incompetence." (Petition for Certiorari, pp. 33-35). The United States says that all the examination of the board members on the applicable law showed was "occasional misunderstandings," It is submitted that the examination showed not "occasional misunderstandings," but no understanding at all. It may also have been significant, as the Clerk testified, that in the seventeen years she had been with the board, *no registrant had ever been assigned to civilian work as a conscientious objector.* (Pet. App. 42a). For whatever reason, it *is* inexplicable that the board voted not to reopen, and this is why the petitioner is saying that he should not have to go to prison for five years.

2. The United States argues that the board did not reject petitioner's claim on the grounds that it was based on non-religious beliefs, but instead rejected it on the grounds that, "as the court of appeals' opinion generally indicates, it concluded that on the basis of petitioner's own *prima facie* showing the claim was not sincerely and genuinely entertained." (Brief of the United States,pp. 22-23, n. 7). As stated previously, this was not the reason given by the board not the reason given by the Court of Appeals in upholding the board's action. In supporting the decision of the board, the Court gave great weight to the letter sent by the petitioner on November 12, 1967, and stated, that the letter "indicated rather clearly that his opposition to serving in the Armed Forces was based on

essentially political, sociological or philosphical views and his conscience rather than on religious training and belief." 412 F.2d at 425. When the case was before the Sixth Circuit, the United States itself argued that, "Therefore, it is submitted that the basic requirement, 'By reason of religious training and belief,' is missing and completely void in the information supplied in support of the registrant's claim of conscinetious objection and request for a I-0 classification." (Brief of United States in *U.S. v. Mulloy*, p. 20). It concluded that:

> "It is submitted that the Court may properly determine that the registrant did not make out a *prima facie* case of conscientious objection to military service on the basis of religious training and belief, that the facts alleged by the appellant, even if true, would not have entitled him to the classification claimed, that in view of the appellant's occupational activities, his status with the law, and his willingness to fight for a cause in which *he* believed, the submission of a claim of conscientious objection was patently frivolous... *(id.* at p. 39).

The Court of Appelas was inpressed by the argument of the United States that the petitioner was not a "religious C.O." It is the requirement fo "religiosity" which is being challenged in *United States v. Sission*, No. 305, this Term, and *Welsh v. United States*, No. 76, this Term, and since the decision of the Court of Appeals proceeded on the assumption that the board could find that the petitioner was not a "religious C.O.," certitorari should be granted for this reason as well.

3. Throughout these proceedings the United States has been shifting its ground in an effort to uphold the action of Local Board 47 and to sustain the conviction of the petitioner. All the petitioner has sought from his local board was reopening of his classification so that his claim of conscientious objection could be considered, and if denied, the administrative appeal provided by the regulations. No classification of a registrant is permanent. 32 F.F.R. Section 1625.1(a). All that is necessary

to authorize the board to reopen is that the registrant make a request "accompanied by written information presenting facts not considered when the registrant was classified, which, if true would justify a change in the registrant's classification." 32 C.F.R. Section 1625.2. Reopening would seem to be particularly important in the case of a claim for classification as a conscientious objector in view of the strong Congressional policy to afford "meticulous procedural protections to applicants who claim to be conscientious objectors, and indeed to grant deferment in appropriate cases." *United States v. Gearey*, 368 F.2d 145, 150 (2d Cir., 1966).

The petitioner sumbitted his request for classification as a conscientious objector to his local board as soon as it had matured. He completed the SSS Form 150 in detail and accompanied his request by supporting letters. The board members looked at his file, if at all, only at the time of his "courtesy interview," and did not give it careful consideration. This board had never, in the memory of the Clerk, granted classification as a conscientious objector, and as the testimony of the members indicates, had little or no understanding of the applicable statute and regulations. The petitioner was told by the board that "there was nothing new" and that what he really wanted was an occupational deferment. The board said that it had not reopened the classification and denied petitioner an administrative appeal.

At the District Court level, the United States argued that the action of the board was justified, since even assuming the petitioner's sincerity (which it said the board did), he did not make out a *prima facie* case, because he really was seeking an occupational deferment rather than classification as a conscientious objector. On appeal, the United States added the argument that the petitioner's opposition to war was not based on religious training and belief. It now argues that the action of the board was justified, because although the petitioner may have made out a *prima facie* case of conscientious objection on the basis of religious training and belief, the board could find that he was not sincere, and, therefore, could refuse to reopen.

The arguments of the United States have come full circle. At first it was argued that since the board assumed the petitioner to be sincere, it did not in fact reopen the classification. Now it is argued that the board found that the petitioner was not sincere so that it was justified in refusing to reopen. Left unanswered is why the belated finding of insincerity did not constitute a reopening in fact.

The primary contention of the petitioner all along has been that the board either abused its discretion in refusing to reopen or that it reopened in fact. All the other Courts of Appeal that have passed on the question have held that the board may not engage in evaluative consideration of the claim on the merits under the guise of refusing to reopen. Now the United States is arguing that the petitioner's board did not engage in evaluative consideration when it found that despite the *prima facie* sufficiency of his SSS 150 Form and the supporting letters, the claim was not "sincerely and genuinely entertained." (Brief of the United States, pp. 22-23, n. 7). If this is not evaluative consideration, it may be asked what is. The petitioner's board, under the guise of refusing to reopen, has determined the merits of his claim and decided that he was not entitled to classification as a conscientious objector, but without affording him the administrative appeal to which he was entitled. This is contrary to what the regulations provide, and in no other reported case has a conviction been permitted to stand in such circumstances.

The petitioner faces the maximum sentence of five years' imprisonment and a fine of $10,000. It is unfair to allow this penalty to be imposed upon him so that the "legality" of the actions of Local Board No. 47 may be upheld. His case is indistinguishable from all the others where local board have made a merits determination under the guise of refusing to reopen the classification. The decision of the Court of Appeals in the case at bar sanctions such a practice in the Sixth Circuit, and certiorari should be granted to make it clear whether it was correct in so doing, and whether all the other Courts of Appeal are in error.

CONCLUSION

For the reasons aforesaid, and for the reasons set forth in the Petition for Certiorari, it is respectfully prayed that the writ be granted.

Respectfully submitted,

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